

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2243

Cir. Ct. No. 2015SC16426

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CITY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

v.

SARAH MARSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
CLARE L. FIORENZA, Judge. *Affirmed.*

¶1 BRASH, J.¹ Sarah Marson appeals an order granting the City of Milwaukee's motion for summary judgment. Marson argues that she was denied

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

her right to a jury trial and that the property taxes levied against her property constitute an unconstitutional tax. We disagree and affirm.

BACKGROUND

¶2 For the levy year 2013, the City issued an assessment and tax bill for the property located at 3501 North 42nd Street in Milwaukee (the Property). Because this tax bill was never paid, the taxes, including any and all special assessments and charges, as well as interest and penalties pursuant to WIS. STAT. § 74.47, became delinquent in July 2014. Based upon property ownership records provided by Chicago Title Company, and maintained by the City, Marson had an ownership interest in the Property while the aforementioned taxes and other charges were delinquent. Nothing in the record indicates that the Property has ever been exempt from taxation.

¶3 On June 23, 2015, Kohn Law Firm, acting on behalf of the City, commenced the underlying small claims lawsuit against Marson for the delinquent 2013 tax bill.² On August 25, 2015, the City filed a motion for summary judgment arguing that Marson failed to follow the statutorily prescribed method of challenging property tax assessments. Nothing in the record indicates that Marson ever challenged the assessment of the 2013 taxes levied against the Property prior to the commencement of the underlying case. On September 15, 2015, the circuit court granted the City's motion for summary judgment. An order for judgment

² Kohn Law Firm, S.C. is the City of Milwaukee's agent representing the City in its *in personam* collection efforts.

against Marson in the amount of \$3385.78³ was entered by the circuit court on October 2, 2015. This appeal follows.⁴

ANALYSIS

¶4 Marson's May 5, 2016 brief does not reference what standard of review we should apply to her argument. It appears that Marson is asking us to exercise our discretionary power to reverse the circuit court. WISCONSIN STAT. § 752.35 states:

In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the [circuit] court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Id. We note, however, that Marson is appealing from an order granting the City's motion for summary judgment. Whether summary judgment was properly granted by the circuit court is a question of law that we review *de novo*. See *Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d

³ This amount includes the levied tax against the Property, as well as interest and fees associated with the underlying small claims case.

⁴ On November 14, 2016, the City filed a motion to dismiss this appeal on the grounds that Marson failed to serve a copy of her reply brief upon the City. On November 22, 2016, we issued an order denying the City's motion for dismissal, but ordering Marson to serve the City with a copy of her reply brief by December 7, 2016 and to notify us in writing that she has done so. The order further stated that if Marson failed to serve the City by December 7, 2016, we would strike her reply brief pursuant to WIS. STAT. § 809.83(2). Marson failed to comply with this order and, as such, we hereby strike her reply brief and refuse to consider it.

294. In reviewing an order granting summary judgment, we evaluate the affidavits and other submissions, if there are any, by the opposing party to determine “whether there ‘exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial.’” See *Swatek v. County of Dane*, 192 Wis. 2d 47, 62, 531 N.W.2d 45 (1995) (citation omitted).

¶5 On appeal, Marson argues that she was denied her right to a jury trial and that the property taxes levied against the Property constitute an unconstitutional tax. We address each in turn.

I. Jury Trial.

¶6 WISCONSIN STAT. § 799.21(3)(a) states that “[a]ny party may, upon payment of the fees prescribed in ss. 814.61(4) and 814.62(3)(e), file a written demand for trial by jury. If no party demands a trial by jury, the right to trial by jury is waived forever.” *Id.* “[W]hen an appeal is brought on a partial transcript, the scope of the review is necessarily confined to the record before the court.” *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). It is the appellant’s responsibility to assure that the record is complete. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). If the record is incomplete, we assume that that missing material supports the circuit court’s ruling. See *id.* at 27.

¶7 Marson states in her brief that, “[w]hile in court, the first thing I requested was a jury trial.” There is nothing in the appellate record, however, that indicates Marson requested a trial by jury or paid the jury fee. Absent such record, whether it be a transcript or a jury fee receipt, Marson’s argument cannot be verified and we must assume the circuit court did not err. See *id.* Accordingly, we

conclude that Marson waived her right to a jury trial and the circuit court, therefore, did not err in rendering its decision.

II. The Property at Issue is Taxable Real Property.

¶8 Marson argues that the tax levied against her property is an unconstitutional tax. Marson, however, failed to follow the statutorily prescribed method for challenging a property tax assessment and is therefore precluded from raising such an argument now.

¶9 WISCONSIN STAT. § 70.47(16)(a) clearly sets forth the method for challenging the regular property tax assessment. That statute states:

In 1st class cities all objections to the amount or valuation of real or personal property shall be first made in writing and filed with the commissioner of assessments on or before the 3rd Monday in May. No person may, in any action or proceeding, question the amount or valuation of real or personal property in the assessment rolls of the city unless objections have been so filed.

Id.

¶10 It is undisputed that Marson had an ownership interest in the Property when the assessment was issued. It was her duty, therefore, to object to the assessment by the deadline set forth in WIS. STAT. § 70.47(16)(a). There is nothing in the record that indicates Marson objected, let alone timely objected. Again, our review is limited to the record before us. *See Austin*, 86 Wis. 2d at 641. Accordingly, we conclude that Marson is precluded from challenging the assessment.

¶11 For the sake of completeness, however, we briefly address Marson's argument that the tax levied against her property is unconstitutional. Marson

asserts that the Property is “private property” and, therefore, not amenable to taxation. Marson, however, appears to mistake “private property”—or, by law “personal property”—with “real property.” As such, she presents flawed legal conclusions that the City has somehow violated her constitutional rights.

¶12 There are three terms at issue here: general property, real property, and personal property. General property is defined in WIS. STAT. § 70.02 as “all the taxable real and personal property defined in ss. 70.03 and 70.04.” Real property is defined in WIS. STAT. § 70.03(1) to “include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto.” Personal property is defined in WIS. STAT. § 70.04(1g), in pertinent part, as “[a]ll goods, wares, merchandise, chattles, and effects, of any nature or description, having any real or marketable value, and not included in the term ‘real property,’ as defined in s. 70.03.” There is a presumption that all property is taxable, and the burden of proof is on the person claiming the exception to prove otherwise. *See* WIS. STAT. § 70.109.

¶13 In support of her argument, Marson references the Fifth Amendment to the Constitution, which pertains to the government’s power of eminent domain. Marson, however, fails to show how the Property has ever been subject to the City’s use of eminent domain. Marson also cites Article 1, Section 9, Clause 4 of the United States Constitution, which states “[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” Article 1, Section 9, Clause 4, however, is unrelated to the City’s right to levy property taxes or its right to enforce its collection of delinquent property taxes.

¶14 The City's records show that the Property has continuously been a taxable property pursuant to WIS. STAT. Ch. 70 and there is nothing in the appellate record that indicates otherwise. Marson, therefore, has failed to meet her burden of showing the Property is exempt from taxation. *See* WIS. STAT. § 70.109. Furthermore, notwithstanding our conclusion that Marson waived her right to a jury trial and failed to follow the statutorily mandated procedure for challenging a property tax assessment, we see nothing in the record that leads us to believe that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried. *See* WIS. STAT. § 752.35. Accordingly, we decline to exercise our discretionary reversal power.

¶15 For the foregoing reasons, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

